Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSHUA ELI RAFF,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Joshua Raff was detained by a police officer, and when asked inquisitorial questions, stood silent. He was immediately handcuffed and formally arrested. He did not testify at trial, yet this silence was the subject of testimony by the police officer during the state's case-in-chief and argument by the prosecutor to the jury that they should affirmatively consider it as evidence of guilt.

The constitutionality of using silence in this fashion was specifically left undecided in *Jenkins v. Anderson,* 447 U.S. 231, 236, n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment" and has resulted in a split of decisions among the Circuit Courts and the courts of several states.

The question presented is plain and fundamental:

Does the state violate a Defendant's Fifth Amendment "right to remain silent," as applied to the states by the Due Process Clause of the Fourteenth, by 1) eliciting testimony from the arresting police officer in their case-in-chief and over objection that during his initial detention the defendant said nothing in response to the officer's inquisitorial questions, and 2) the prosecutor arguing to the jury that such silence should be affirmatively considered as substantive evidence of his guilt?

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

PETITIONER prays that a Writ of Certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, entered in this cause on July 15, 2009. The California Supreme Court denied Review on October 22, 2009.

OPINIONS BELOW

The opinion of the California Court of Appeal is unpublished and appears at App. 1-21. The order of the California Supreme Court denying review is unpublished and appears at App. 22.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a), because the decision of the California Court of Appeal denied the defendant a "right . . . or immunity . . . claimed under the Constitution . . . of . . . the United States." This Petition is timely filed within 90 days of the October 22, 2009 denial of review by the California Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRELIMINARY STATEMENT

This Petition raises the issue left undecided in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980), of "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment." This issue has remained unaddressed by this Court for nearly 30 years. The question of whether pre-arrest silence can be used against a non-testifying defendant as affirmative evidence of guilt has created a three-way split among seven of the Circuits. It has

also created a substantial split in the decisions of the state courts.

The evidential use of prearrest silence in this case perfectly exemplifies the fundamental unfairness of the dilemma presented to a citizen who is even moderately aware of his "rights." This Court has held that a citizen can exercise his privilege against self-incrimination at any time in the face of official questioning. Indeed, in *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court labeled the right the "right to remain silent." "*Miranda* warnings" are so ubiquitous in the popular media that even the most uninformed citizen is aware of his "*Miranda* rights." And yet, when the Petitioner in this case exercised that right by actually remaining silent in the face of police questions, his silence was devastatingly used against him as evidence of his consciousness of guilt. Indeed, the prosecutor summed up on it. Had he verbally "taken the Fifth" to the officer or in front of a Grand Jury or in a civil proceeding, or refused to make a statement after being "*Mirandized*," no use of *any kind* could have been made of it in his criminal trial. But here, by simply remaining silent in the face of questions by a police officer while he was "detained," his exercise of this right was used to convict him.

A definitive ruling by this Court is necessary to clarify the scope of the Fifth Amendment "right to remain silent."

STATEMENT OF THE CASE AND FACTS

A. Procedural History

An Information filed September 21, 2006, charged Petitioner Joshua Raff with three counts of second-degree robbery and with the special allegation (enhancement) that he used a handgun during two of the robberies.

Raff pled not guilty. His co-defendant, Casey Bowen, who was charged in one of the counts with him and with two other robberies, pled guilty on the morning of trial.

In its case-in-chief at trial the prosecution was allowed, over objection, to introduce testimony from a police officer that Raff remained silent when questioned after being "detained" – on the theory that his silence was evidence of consciousness of guilt. Raff did not testify. In summation, the prosecutor argued the theme of consciousness of guilt, including, for example, "[Raff] wouldn't even respond to him. Does that seem like someone who hasn't done anything wrong, didn't know what [was] happening, was innocent to this whole situation?" (App. 33. The Reporter's Transcript of these portions of the trial proceedings appears at App. 23-34.)

The jury convicted Raff of counts 1, 2 and 5 and found the special allegation true. The trial court sentenced him to concurrent terms of two years plus a ten-year enhancement for the use of the gun for a

total sentence of 12 years. He is presently serving that sentence.

Raff's Motion for New Trial included the issue now being presented to this Court. The trial court rejected it without analysis.

Raff timely appealed to the California Court of Appeal, Second Appellate District, and raised this issue. In its unpublished opinion (App. 1-21), the court wrote:

> Raff argues that the prosecution's comments on his silence violated his Fifth Amendment right to due process.[1] We disagree. Raff was not under arrest and Officer Bambrick *was not investigating, nor was he even aware of, the robberies for which Raff was standing trial.* There is a split in the federal courts regarding whether the Constitution is violated when the prosecution comments on a defendant's silence occurring before his arrest and before he received *Miranda* warnings, and uses that silence to argue consciousness of guilt.

(App. 13, emphasis in original.) The court concluded that "[t]he trial court properly admitted the evidence

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[1] Petitioner actually argued a violation of his Fifth Amendment right not to be compelled to be a witness against himself – his "right to remain silent" – as applied to the states by the Due Process Clause of the Fourteenth Amendment, citing, *inter alia*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

that Raff was silent when questioned after the traffic stop." (App. 14.)

This issue was again raised in a Petition for Review timely filed with the California Supreme Court, which was denied on October 22, 2009. (App. 22.)

This Petition for a Writ of Certiorari is being timely filed within 90 days of that denial.

B. Statement of Facts

1. The Robberies

In the early morning of May 18, 2006, a man wearing a hooded, gray sweatshirt robbed Refugio Gomez at gunpoint as he walked home from work in Santa Monica. (Count 1) The robber demanded his money and car keys. Gomez did not have any car keys. The robber took $65. While Gomez described the robber to the police as a man in his thirties, 5' 6", 160 pounds, he nonetheless identified Raff, *who is 19 years old, 5' 9", 200 pounds*, as the robber at trial.

In the early morning hours of May 21, 2006, a man wearing a hooded, gray sweatshirt robbed Paul Tifford at gunpoint as he approached his car on a street corner in Los Angeles. (Count 5) The robber demanded and took Tifford's wallet containing money and credit cards. While Tifford, who is himself Black, described the robber to police as a "male Hispanic or a Black person," 5' 8", 150 pounds, he nonetheless

identified Raff, who is *Caucasian, 5' 9", 200 pounds,* as the robber at trial.

At approximately 8:30 p.m. on the evening of May 21, 2006, a man wearing a white, hooded sweatshirt and a dark bandana covering his face robbed Michael Silverman as he walked home from a supermarket in Santa Monica. (Count 2) The robber demanded and took Silverman's wallet containing money and credit cards. Silverman identified Raff's former co-defendant Bowen as the robber.[2]

2. The Traffic Stop and Questioning Resulting in Petitioner's Silence

At approximately 9:45 p.m. on May 21, 2006, LAPD Officer David Bambrick and his partner were patrolling the beach community of Venice, California, on the west side of Los Angeles. While stopped at a red light, they looked across the intersection and observed that the two occupants of a silver Kia Optima did not appear to have their shoulder harnesses on.[3]

Noting this "vehicle violation," they made a u-turn and pursued the Kia, which accelerated away

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[2] Silverman testified that Raff was *not* the robber and was not present. Raff was charged in this count as an aider and abettor.

[3] California Vehicle Code §27315(h) declares a seat belt violation to be an infraction subject to a $20.00 fine for a first offense; no arrest is authorized.

at speeds in excess of the speed limit. As the officers were following – "probably about 100 feet away," – Officer Bambrick saw that Raff, the passenger, "appeared to be as if he was leaning out towards the open window of the passenger side of the vehicle." At that point, the officers lost sight of the Kia for a short period. They followed the Kia around several blocks observing various traffic violations. When the Kia finally stopped, they "turned on [their] red light to conduct a traffic stop."

Bambrick's partner ordered the driver, co-defendant Casey Bowen, out of the car and "recovered a driver's license from Mr. Bowen's pocket" which belonged to Michael Silverman, the victim of the third robbery.

While Bowen was being arrested, Officer Bambrick approached the passenger, Petitioner Raff. "Once I walked up to him and illuminated him with my flashlight, I told him to place his hands – either I told him to put them on his knees or on the dashboard in front of him. And at that point he just stayed in that position." After Bowen was handcuffed "I got Mr. Raff out of the car and detained him."

At that point, Officer Bambrick asked Raff, "Hey. What's going on? You know, what's up with the driving?" Raff remained silent and "just kind of stared straight ahead." He was then immediately handcuffed and placed in the patrol car. Following his arrest Officer Bambrick searched the passenger seat where Mr. Raff had been sitting and found "nothing

that I recall that was significant." In Mr. Bowen's seat, however, he found a black leather wallet belonging to Paul Tifford, the victim of the second robbery.

Officer Bambrick then returned to the location where he had lost sight of the Kia and found a .45 caliber handgun lying on the sidewalk. A magazine for the gun was lying in the gutter nearby.[4]

Though there was a modicum of circumstantial evidence presented that the prosecution argued proved Mr. Raff's guilt – most notably a text message around the time of the Silverman robbery on Raff's phone that even the prosecutor in his argument conceded might not be about the Silverman robbery but "may be referring to Mr. Tifford. . . . I don't know" – the vast majority of circumstantial evidence (the Kia rented to Bowen, the gun stolen from Bowen's neighbor, the sweatshirts in the trunk of the Kia, Silverman's driver's license in Bowen's pocket, the Tifford wallet in Bowen's seat) was all connected to Casey Bowen. The prosecution of Joshua Raff was founded almost entirely on the puzzling eyewitness identifications of him by Mr. Gomez and Mr. Tifford, his presence in Bowen's Kia and his "guilty" silence in response to Officer Bambrick's questions.

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[4] The victims identified the gun as looking like the one used in the robberies.

C. Facts Specific to the Constitutional Issue Presented.

During the prosecution's case-in-chief and over an objection by trial counsel, the prosecution offered Raff's silence in response to Officer Bambrick's questioning as evidence of consciousness of guilt.[5] At sidebar in response to the objection, the trial court stated, "[T]he fact that he won't give any information as to anything in response I think indicates . . . consciousness of guilt." The court went on to note:

> To me, any reasonable person who is not guilty of a crime would not try to evade. When asked that question, would say something like, "I don't know. My friend just went crazy. He just saw an old girlfriend he – he wanted to get away from her. He thought he was being chased."
>
> I mean, there could be a million different things that an innocent passenger would say under these circumstances. The fact that he didn't say anything, to me, is consciousness of guilty knowledge as to something, objects in the car, the fact that he committed a

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[5] Counsel objected, and elaborated at sidebar: "If he doesn't answer any questions or anything, why is the question even being asked in front of the jury?" While the objection was not phrased as well as it could have been (App. 27-30), it was expanded in Raff's Motion for New Trial and properly raised in the state courts. The state did not argue waiver and the Court of Appeal ruled on the Constitutional issue, thus preserving this issue for review.

> robbery with this guy earlier that day. I don't know.

(App. 29.)

Pursuant to this ruling, Officer Bambrick testified that while detained Mr. Raff chose to remain silent rather than respond to his questions. The prosecutor's summation compounded the harmful effect of this testimony:

> Officer Bambrick then approaches the [Petitioner], says, "What's going on?" He's looking around nervously. Wouldn't even respond to him. Does that seem like someone who hasn't done anything wrong, didn't know what [was] happening, was innocent to this whole situation?
>
> The Officer said, "Hey. What's going on? What are you guys doing?" Officer Bambrick doesn't know there's a string of robberies going on.
>
> The defendant won't even talk to him. Does that seem like innocent behavior? Absolutely not.
>
> * * *
>
> He knew what was going on when the police stopped him and said, "What's happening? What's going on? What are you guys doing?" and he doesn't even talk.

(App. 33-34. The direct examination, objection, colloquy and ruling, as well as the prosecutor's

summation in this regard, are all set forth verbatim at App. 23-34.)

REASONS FOR GRANTING THIS PETITION

This case provides the Court with an opportunity to decide "an important question of federal law that has not been, but should be, settled by this Court" (Rule 10(c), Supreme Court Rules) that was specifically left undecided in *Jenkins v. Anderson*, 447 U.S. 231, 236, n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."

This case presents a fundamental yet unresolved issue of Fifth Amendment jurisprudence: Can the state, in its case-in-chief, elicit testimony that a non-testifying defendant remained silent in the face of police questioning and affirmatively argue to the jury that this silence is evidence of guilt?

This seemingly simple question has resulted in serious conflicts among the federal circuits and among the state courts. The California Court of Appeal's decision in this case conflicts with a number of these decisions. As such, certiorari should be granted. (Rule 10(b), Supreme Court Rules.)

A. Constitutional Foundations: This Court has declared that an individual has the "right to remain silent" in all interactions with the police.

In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), this Court said plainly and with great clarity:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – *the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.*

(emphasis added.)

This Court has held that the invocation of the privilege against self-incrimination must be given a "liberal construction." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 487. The invocation of the privilege against self-incrimination does not require any special combination of words. *Quinn v. United States*, 349 U.S. 155, 162 (1955). The privilege against self-incrimination can be asserted in any investigatory or adjudicatory proceeding, *Kastigar v. United States*, 406 U.S. 441, 444 (1972), and "*at the time of arrest and* during custodial

interrogation, innocent and guilty alike – perhaps particularly the innocent – may find the situation so intimidating that they may choose to stand mute." *United States v. Hale*, 422 U.S. 171, 177 (1975) (emphasis added).

This Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), two years after *Malloy* and added a protective or "prophylactic" rule that the police must, when things proceed to the level of "police custodial interrogation," inform the suspect of that right and several appurtenant rights, such as the right to have counsel present during questioning. The *Miranda* decision, however, in no way conditioned the existence of "the right of a person to remain silent" on the timing or actual giving of the warnings.[6]

This Court's precedents establish that this "right to remain silent" in the face of police questioning applies with equal force at every stage and in every setting of interaction between individuals and the police:

> *Consensual encounter*: *"The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way* (citations omitted)." *Florida v. Royer*,

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[6] "The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution." *Jenkins, supra*, 447 U.S. at 247 n.17 (Marshall, J., dissenting).

460 U.S. 491, 497-98 (1983) (emphasis added);

Detention: "[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (emphasis added)[7];

Custodial interrogation: "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*" *Miranda v. Arizona*, 384 U.S. at 468 n.37 (emphasis added).

These cases under both the Fourth and Fifth Amendments, applied to the states under the Fourteenth, make clear that it makes no analytical

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[7] See also *Hiibel v. Sixth Judicial District Court Of Nevada, Humboldt County*, 542 U.S. 177 (2004), in which an officer, under a Nevada statute, attempted to obtain the identity of the person detained, which is not what Officer Bambrick was doing in this case. In *Hiibel*, the Court distinguished between seeking a name, which it found "to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances," *id.* at 191, and any other information which would have the potential to be significantly more incriminating. For example, in the present case, if Raff had even acknowledged knowing Bowen, it could have been highly incriminating.

difference if Petitioner was "in custody" for *Miranda* purposes or actually received his "*Miranda* rights" since his "right to remain silent" is not dependent on when – or if – a police officer chooses to advise him of that right. At every step along the continuum of police-individual contacts, this Court has flatly stated that the individual is under no obligation to respond to police questions other than in the "unfettered" exercise of his will, and shall suffer no adverse consequences for exercising that right.

Even a 19-year-old like Joshua Raff must be presumed to have seen at least a few episodes of "*Law & Order*", and thus have reason to believe and rely upon the common knowledge that he had a "right to remain silent" under precisely the circumstance he found himself in. Such a reasonable understanding of reality was confirmed by this Court when Chief Justice Rehnquist wrote in *Dickerson v. United States*, 530 U.S. 428, 443 (2000), that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."

There is, however, another line of *impeachment* cases since *Miranda* that, as will be seen below, has caused a blurring of this analysis in some courts. In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Court held that post-*Miranda* silence could not be used to impeach a testifying defendant:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence

> will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Thereafter in *Jenkins*, *supra*, the Court found no constitutional impediment to impeachment with pre-arrest, pre-*Miranda* silence because there was no implicit assurance for someone to rely upon since warnings had not been given. Similarly, in *Fletcher v. Weir*, 455 U.S. 603, 607 (1982), the Court found no constitutional impediment to impeachment with post-arrest, pre-*Miranda* silence:

> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

These latter cases dealt with defendants who chose to take the stand at their trials and waive their Fifth Amendment right not to testify. At that point, their previous silence was offered to impeach the credibility of the testimony they chose to give. In the present case, Raff did not testify, and the "evidence of silence" was affirmatively offered as substantive

evidence of guilt. Justice Stevens dissented from the *Doyle* decision, but pointed out that "as long ago as *Raffel v. United States*, 271 U.S. 494 [(1926)], this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes" (426 U.S. at 628 (Stevens, J., dissenting)), the former being a far more serious matter than the latter. In *United States v. Hale*, *supra*, 422 U.S. 171, 177 for instance, the Court was in no doubt that "in most circumstances silence is so ambiguous that it is of little probative force."

It thus appears from this Court's decisions that allowing use of a testifying defendant's silence for impeachment purposes is an exception to the rule that silence in the face of official questioning cannot be affirmatively used. It is founded on the concept that the defendant has waived his Fifth Amendment right not to testify, so absent *Miranda* warnings earlier silence, just as earlier statements, can be challenged for credibility. Unfortunately, the lower courts, lacking guidance from this Court, have confused the exception with the rule.

B. The Conflicts Among the Circuits and the State Courts: There are at least three conflicting approaches to the use of silence as affirmative evidence of guilt. This has caused unequal and disparate treatment of defendants throughout the nation.

The Sixth Circuit faced the question of whether prearrest silence could be used as affirmative

evidence of a non-testifying defendant's guilt in *Combs v. Coyle*, 205 F.3d 269, 281 (6th Cir. 2000). The court in that case considered the question at length, noting that the Circuits were divided on the issue and further noting that this Court's decision in *Jenkins* did not resolve the question, "namely, whether the use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment." *Id.* The court saw the obvious distinction between use of silence for impeachment purposes and use of it as substantive evidence of guilt. "That use of a defendant's prearrest silence as substantive evidence of guilt is significantly different than the use of prearrest silence to impeach a defendant's credibility on the stand is clear." *Id.* The court noted that the question had equally divided the Circuits:

> Three circuits have held that such use violates the privilege against self-incrimination found in the Fifth Amendment, relying principally upon *Griffin* [*v. California*, 380 U.S. at] 609 [(1965)]. *See United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992).
>
> * * *
>
> Three circuits, on the other hand, have reached the opposite conclusion. *See United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d

> 590, 593 (5th Cir. 1996); and *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998).

Combs, 205 F.3d at 282.

The *Combs* court broke the tie and ruled that the affirmative use of prearrest silence violates the Fifth Amendment and does not depend on when, or if, the officer decides to advise a person being questioned of his right to remain silent:

> We agree with the reasoning expressed in the opinions of the Seventh, First, and Tenth Circuits, and today we join those circuits in holding that the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. Like those circuits, we believe "that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime." *Coppola*, 878 F.2d at 1565. The Supreme Court has given the privilege against self-incrimination a broad scope, explaining that "[i]t can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." [Citations omitted.] In a prearrest setting as well as in a post-arrest setting, it is clear that

> a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply.

205 F.3d at 283.

Other Circuits have been as troubled by the split in authority. For instance, the Fifth Circuit noted the three-way split in its opinion in *United States v. Pando Franco*, 503 F.3d 389, 396 n.1 (2007):

> The issue has also split the circuit courts. The Ninth, Tenth, and D.C. Circuits hold that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-30 (9th Cir.2001) (*en banc*); *United States v. Whitehead*, 200 F.3d 634, 637-39 (9th Cir.2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir.1991); *United States v. Moore*, 104 F.3d 377, 384-90 (D.C.Cir.1997). The First, Sixth, and Seventh Circuits go even further and hold that the use of pre-arrest silence as substantive evidence of guilt is impermissible under the Fifth Amendment. *See Coppola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir.1989); *Combs v. Coyle*, 205 F.3d 269, 280-83 (6th Cir.2000); *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir.1987). Finally, the Fourth, Eighth, and Eleventh Circuits hold that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt does not violate the Fifth Amendment privilege against

> self-incrimination. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir.1985); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir.2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir.1991).

The *Pando Franco* court avoided resolving the issue. Other Circuits have also noted the split. *See, e.g., United States v. Green*, 541 F.3d 176, 188 n.12 (1st Cir. 2008) (calling the question "somewhat thorny").

The Eleventh Circuit's decision in *Rivera* provides a perfect example of how both *Jenkins* and *Fletcher v. Weir*, *supra*, which concerned solely the question of impeaching a testifying defendant with prior silence, have been misconstrued to indicate that the government can use silence as affirmative evidence of guilt and comment upon it to the jury. In *Rivera*, the Circuit faced the use of a non-testifying defendant's silence during a Custom's examination both prior to and after arrest. The Circuit expressed its conclusions in this fashion:

> The government may comment on a defendant's silence if it occurred prior to the time he was arrested and given his *Miranda* warnings. [Citing *Jenkins* as sole authority for this statement.] . . . In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given. [Citing *Fletcher v. Weir*, *supra*, as sole authority for this statement.]

Rivera, 944 F.2d at 1568 (footnotes citing the cases omitted).

While most state courts have precluded the affirmative use of a defendant's prearrest silence either on state law grounds or pursuant to the constitutional privilege against self-incrimination, there is a split in these courts as well. Maryland's highest court surveyed the decisions of the Federal Circuits and other states and found that a majority of jurisdictions had concluded that prearrest evidence of silence is inadmissible. *Weitzel v. State*, 863 A.2d 999, 1003 n.3 (Md. 2004). In its survey of state court decisions, the *Weitzel* court found the split to be profound, though tilting toward inadmissibility:

> State courts are also split on the issue, with some courts holding that pre-arrest, pre-*Miranda* silence is not admissible as substantive evidence of guilt. *See People v. Welsh,* 80 P.3d 296 (Colo.2003); *People v. Rogers,* 68 P.3d 486, 492 (Colo.Ct.App.2002); *Landers v. State,* 270 Ga. 189, 508 S.E.2d 637, 638 (1998); *State v. Moore,* 131 Idaho 814, 965 P.2d 174, 180 (1998); *State v. Dunkel,* 466 N.W.2d 425, 428-29 (Minn.Ct.App.1991); *State v. Rowland,* 234 Neb. 846, 452 N.W.2d 758, 763 (1990); *People v. DeGeorge,* 73 N.Y.2d 614, 543 N.Y.S.2d 11, 541 N.E.2d 11, 13 (N.Y.1989); *State v. Leach,* 102 Ohio St.3d 135, 807 N.E.2d 335, 342 (2004); *Hartigan v. Commonwealth,* 31 Va.App. 243, 522 S.E.2d 406, 410 (1999), *aff'd en banc* 32 Va.App. 873, 531 S.E.2d 63

> (2000); *State v. Easter,* 130 Wash.2d 228, 922 P.2d 1285, 1292 (1996); *State v. Fencl,* 109 Wis.2d 224, 325 N.W.2d 703 (1982); *Tortolito v. State,* 901 P.2d 387, 390 (Wyo.1995).
>
> Other [State] courts hold that pre-arrest, pre-*Miranda* silence does not implicate the Fifth Amendment. *State v. Leecan,* 198 Conn. 517, 504 A.2d 480, 484 (1986); *State v. Kinder,* 942 S.W.2d 313, 326 (Mo.1996); *State v. Helgeson,* 303 N.W.2d 342, 348 (N.D.1981).

Id.[8] The *Weitzel* court "join[ed] the increasing number of jurisdictions" and held that such evidence "is too ambiguous to be probative when the 'pre-arrest silence' is in the presence of a police officer." 863 A.2d at 1002.

C. The Need For a Clear Decision From This Court is Plain.

As set forth above, the lower federal courts and courts of a number of states have been dealing with a lack of clear precedent from this Court since the 1980 *Jenkins* decision, and the result is confusion, complexity and conflict. *Doyle*, *Jenkins* and *Weir* make clear how *silence for impeachment* purposes is analyzed, but the use of *silence as affirmative,*

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[8] Other courts have found the split in authority troubling, as well. *See, e.g., Hennessy v. State*, 268 S.W.3d 153, 158-61 (Tex. App. Waco, 2008) (citing the conflicting decisions and the conflicting commentary that those decisions have spawned).

substantive evidence of guilt remains unnecessarily muddied.

A plurality of the courts that have weighed in on this issue have suggested that *Griffin v. California,* 380 U.S. 609 (1965), provides a model for decision in this case. This Court in *Griffin* granted certiorari "to consider whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy v. Hogan*. . . ." *Id.* at 611. The Court decided that it did:

> [C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

Id. at 614 (citations and footnote omitted). The Court held:

> [T]hat the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Id. at 615 (footnote omitted).

Though the decision concerned silence during trial, the language of the *Griffin* holding indicates no

such limitation. Petitioner respectfully suggests that the import of *Griffin* is that the prosecution is forbidden from eliciting any testimony in their case-in-chief or making any comment to the jury on the "accused's silence" in the face of official questioning as affirmative evidence of guilt whether the "right to remain silent" was exercised inside or outside of the courtroom, before or after *Miranda* warnings are given. That is the meaning of the "right to remain silent" that this Court applied to the states in *Malloy*: "*[T]he right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.*" *Malloy*, 378 U.S. at 8.

If that rule does not apply to someone in Petitioner's circumstances, to whom would it apply?

CONCLUSION

Someone in Joshua Raff's position might not fully understand the criminal justice system or the Constitution, but he would certainly remember the ubiquitous phrase "you have the right to remain silent; anything you say can and will be used against you in a court of law." So, when asked potentially incriminating questions by a police officer, he remained silent only later to be told that it wasn't true and that beyond any words he might have uttered, his silence would also be used against him in a court of law.

Such a rule unfairly burdens a defendant's right not to testify by shifting the burden of proof onto the accused to prove his or her innocence – to answer the question why he remained silent – returning us to the "'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin*, *supra*, at 614.

If silence contemporaneous with arrest can constitutionally be introduced and used to argue that one is guilty of substantive offenses, then everyone who finds themselves in Raff's position is in the untenable position between Scylla and Charybdis where either their words *or* their silence will, in fact, be used against them at trial. They will be damned by their words or damned by their silence. Simply stated, they actually don't have a "right to remain silent" because if they don't come up with a good explanation, it will be argued that their silence is tantamount to a confession.

Only a ruling from this Honorable Court clarifying this conundrum can resolve the fundamental issue presented by this case: Does the "right to remain silent" really mean that when a police officer asks a citizen potentially incriminating questions, that person can remain silent and "*suffer no penalty . . . for such silence*"?

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ELI RAFF, Defendant and Appellant.	B205719 (Los Angeles County Super. Ct. No. SA 060350) (Filed Jul. 15, 2009)

APPEAL from a judgment of the Superior Court of Los Angeles County; Katherine Mader, Judge. Affirmed and remanded with instructions.

Joshua C. Needle for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary

Sanchez and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joshua Eli Raff of three counts of second degree robbery, and found true the special allegations that Raff had personally used a handgun in two of the robberies. Raff appeals, arguing that the trial court committed numerous errors, that there was insufficient evidence, and that his trial counsel provided ineffective assistance. We disagree and affirm his conviction. We amend the abstract of judgment to reflect the proper sentence.

BACKGROUND

An information filed September 21, 2006 charged Raff with three counts of second degree robbery in violation of Penal Code section 211, and one count of receiving stolen property in violation of Penal Code section 496, subdivision (a). The information also charged that Raff used a handgun in two of the robberies, in violation of Penal Code section 12022.53, subdivision (b). Raff's codefendant, Casey Bowen, was charged with second degree robbery in one of the counts charging Raff. Bowen was also charged with two other counts of second degree robbery, one count of receiving stolen property, and one count of forgery. The information charged that Bowen used a handgun in each of the three counts of second degree robbery.

Raff pled not guilty and denied the special allegation. Bowen initially pled not guilty, but during jury selection he withdrew his not guilty plea, pled no

contest to two counts of robbery, and admitted the use of a handgun during those robberies.

At trial, the prosecution presented evidence of a string of robberies.

May 18, 2006 Gomez robbery (Count 1). At 12:50 a.m. on May 18, 2006, Refugio Gomez was walking home from work on Ashland Street in Los Angeles County. He saw a man wearing a grey hooded sweatshirt walking toward him, who put his hands inside the sweatshirt as he drew nearer. The man pulled out a black semiautomatic gun, put the gun to Gomez's head, and said, "Give me your fucking money." The man also asked for Gomez's car keys (Gomez did not have a car), threatened to kill Gomez, and after Gomez gave him his wallet, told Gomez to take off his socks, belt, and pants, to see whether he had more money. The man began to walk away, still pointing the gun. When Gomez asked for his identification card back, the man took Gomez's money ($62-$67) out of the wallet and threw the wallet on the ground. When Gomez retrieved it, the man was gone.[1] The entire robbery took 10-12 minutes.

Gomez said the robber was possibly Hispanic and identified, as the weapon used in the robbery, a semiautomatic handgun which earlier testimony

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[1] No fingerprints were found on Gomez's wallet.

established had been stolen from a neighbor of Bowen's.[2]

A few days after the robbery, police officers showed Gomez two photographic lineups, one containing a photo of Raff and one containing a photo of Bowen. Gomez identified Raff as the robber. Gomez also identified Raff as the robber at a preliminary hearing. At trial, the prosecution brought Bowen into the courtroom and Gomez stated that Bowen did not look like the robber. Gomez identified Raff, both while seated next to counsel and while standing near Gomez, as the robber.

May 21, 2006 Tifford Robbery (Count 5). At 1:30 a.m. on May 21, 2006, Paul Tifford was near Fuller Avenue and Franklin Avenue in Los Angeles County, walking to his car after visiting a friend. As he opened the car door, he heard running behind him, and turned around to see a man pulling out a gun from a grey hooded sweatshirt. Tifford identified Raff as the person who approached him. The man held the gun to Tifford's head and said, "If you do everything that I tell you, you won't get hurt." Pushing Tifford to the back of his car, the man said, "Give me your wallet." Tifford handed over his wallet, asking the man several times not to hurt him. Inside Tifford's

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[2] One of Bowen's neighbors, Keshanna Spencer, testified that she returned to her apartment in August 2005 to find it burglarized. Among the stolen items was a Taurus .45 semi-automatic handgun. After the burglary, Spencer saw Bowen lingering around her apartment.

wallet were three credit cards, an ATM card, a health card, a gift card, Tifford's Social Security card, and money.

The man then pointed the gun in a different direction and said, "This is what you're going to do. . . . Run nigger." Tifford ran to the next street over, and told two people he had been robbed. They let him ride in a taxi with them back to his friend's apartment, where Tifford called the police.

A day or two later, Tifford circled a photograph of Raff in a police "six-pack" as most closely resembling the man who robbed him. Tifford also identified Raff at a preliminary hearing where Bowen also was present. At trial, Bowen was brought into the courtroom, and Tifford stated that the two men did not look at all similar, and that Raff was the man who robbed him of his wallet.

May 21, 2006 Silverman Robbery (Count 2). At 8:30 p.m. later that same day, May 21, 2006, Michael Silverman was walking home on 16th Street from a supermarket in Santa Monica. A man wearing a white hooded sweatshirt with the hood up and a dark bandanna covering his nose and mouth approached from Silverman's right side, put a gun to Silverman's head, and said, "Mother fucker, give me your wallet or your money. And don't think I won't shoot you. You know, don't play with me, mother fucker." Silverman threw his wallet on the ground. The robber said, "Do you think I'm fucking with you . . . mother fucker?" Silverman said no. The robber

picked up the wallet and headed off in one direction, while Silverman began to walk in another. The robber then said, "If you're lucky, you may be able to find your wallet down the road." Silverman began to follow, thought better of it, and headed off toward home. Inside his wallet were Silverman's license, a bank debit card, and two dollars. Silverman called the police on the spot. He was unable to find his wallet.

Silverman identified the gun stolen from Bowen's neighbor as somewhat like the gun used in the robbery. He identified his signature on a six-pack of police photos, describing Bowen's photo as "looks similar to the man who robbed me." Silverman had also identified Bowen as the robber at the preliminary hearing. He stated that Raff was not the robber: "I never saw that man." When Bowen was brought into the courtroom, Silverman stated that this was the man who robbed him "as best as I can recall."

Los Angeles Police Officer David Bambrick testified that he was a passenger with his partner in a patrol car in Venice at 9:45 p.m. on May 21, 2006, about an hour after the Silverman robbery. A silver Kia Optima passed the patrol car with Raff in the passenger seat. Officer Bambrick noticed that neither the driver nor the passenger was wearing a seatbelt, and the patrol car made a U-turn to follow the Optima. The Optima immediately sped up to 50 miles per hour, with the patrol car following. Officer Bambrick saw Raff lean toward the open window on

the passenger side of the Optima as it neared the corner on 7th Avenue. The Optima raced through a red light and the officers continued their pursuit. The Optima eventually slowed down and pulled over, and the officers turned on their red lights to conduct a traffic stop.

The driver began to exit the car and Bambrick's partner told him to get back in. Bambrick identified Bowen, who had been brought into the courtroom, as the driver. Bambrick's partner asked Bowen for his driver's license, and then ordered him out of the car. A search recovered Silverman's license from Bowen's left pants pocket. Bowen was placed in the patrol car.

Officer Bambrick was standing near the Optima's front passenger door, and noticed that Raff was nervous, looking to his left and right and over his shoulder. Bambrick shined his flashlight on Raff and told him to place his hands on his knees or on the dashboard. Officer Bambrick then ordered Raff out of the car and asked him, "Hey. What's going on? You know, what's up with the driving?" Raff stared straight ahead and did not answer. Bambrick handcuffed him and placed him in the patrol car with Bowen.

Ten minutes later, Officer Bambrick returned to the street location where he had seen Raff lean toward the open passenger window of the Optima. He found a .45 caliber semiautomatic handgun on the sidewalk and a magazine nearby. Inside the car, Bambrick found a bandanna. A black leather wallet

was on the driver's seat of the car, containing Tifford's Social Security card and health insurance card. No fingerprints were found on the gun or the magazine. The gun was the semiautomatic in evidence at trial and was identified by the robbery victims as the weapon used.

Santa Monica Police Officer Michael Bambrick[3] and another officer searched the Optima after it was in custody. He found two cell phones in the passenger compartment. One of the phones was Raff's, with his voice on the voicemail message using Spanish words. A text message on Raff's phone sent at 8:44 p.m. just after the Silverman robbery said, "Just a debit card, like, three. That's all they got. Pinche putos."[4] The other phone was Bowen's.

Officer Michael Bambrick also found in the car's glove compartment a May 16 Enterprise rental agreement for the Optima, and a handwritten note. The note contained driving directions leading to a location close to where the Tifford robbery took place. There was a black hooded sweatshirt in the back seat as well as two bags of fast food. A white hooded sweatshirt was in the trunk, with bags of groceries and a Louis Vuitton suitcase. A grey hooded sweatshirt was

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[3] Officer Michael Bambrick is the brother of Los Angeles Police Officer David Bambrick, who also testified for the prosecution.

[4] An interpreter testified that "pinche putos" means "fucking ass hole," "fucking mother fucker," or "fucking fag."

recovered as well, and a police photograph showed Bowen wearing a grey hooded sweatshirt.

Raff's mother testified for the defense that Raff was in their home in Santa Monica all night the evening of May 17 and the early morning of May 18, 2006, according to a notebook she kept at the time. She met Bowen when Raff brought him home in the evening of May 21. Raff and Bowen left shortly thereafter.

In closing argument, the prosecution argued that Raff committed the Gomez and Tifford robberies using the gun, and that Bowen committed the Silverman robbery with Raff aiding and abetting, emphasizing the eyewitness identifications by the victims. The defense argued that Bowen committed all the robberies, and that the eyewitness identifications of Raff were inaccurate and unreliable.

The jury convicted Raff of count 1 (the Gomez robbery), count 2 (the Silverman robbery), and count 5 (the Tifford robbery). The trial court sentenced Raff to the low term of two years on count 1, with a ten-year enhancement for the use of the gun. On count 2, the court imposed a concurrent two-year term for the robbery. As to count 5, Raff received the low term of two years for the robbery with a ten-year enhancement for the gun use, to run concurrently with the sentence on count 1. Raff was ordered to pay restitution and parole revocation fines, and received 714 days of custody credit.

DISCUSSION

I. The trial court did not abuse its discretion in declining to take judicial notice of Bowen's plea of no contest to the Gladstone/Brotman robbery.

After jury selection began, Raff's codefendant Bowen pled no contest to two counts of robbery and the use of a handgun in connection with those robberies. Bowen pled no contest to count 2, the Silverman robbery, and count 6, which alleged that on May 18, 2006, Bowen had robbed Howard Gladstone and Carol Brotman. The Gladstone/Brotman robbery took place about 20-30 minutes after the Gomez robbery, a short distance away. Raff was not charged with the Gladstone/Brotman robbery.

In his opening statement, Raff's counsel argued that Bowen had committed the Gladstone/Brotman robbery and that Bowen, not Raff, had just a short time earlier committed the Gomez robbery nearby. After the opening statement was complete, the prosecution objected to the reference to the Gladstone/Brotman robbery, because the victims were out of the country. Raff's counsel requested that the court take judicial notice that Bowen had pled no contest to the robbery.[5] The court concluded that Bowen's plea to the Gladstone/Brotman robbery had little to do with

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[5] Bowen had also pled no contest to the Silverman robbery, and Raff's counsel argued that the court should take notice of Bowen's plea to both crimes.

whether Raff committed the Gomez robbery a half hour or so earlier. The evidence showed that Raff and Bowen were working together, that Raff was in the car with Bowen when the gun was dropped out of the window, and "I don't see the probative value and, beyond that, the confusion as to when somebody pleads no contest to something whether or not they're pleading really guilty." The court decided to stay with the instruction that the jurors were not to speculate why Bowen was not a part of the case, and denied the request to take judicial notice.

Raff argues that the court's decision not to take judicial notice of Bowen's plea was an abuse of discretion, preventing Raff from presenting his theory of "third party culpability," i.e., that Bowen alone committed all the robberies with which Raff was charged.[6] When the trial court decides to exclude evidence under Evidence Code section 352 because its probative value is substantially outweighed by the probability that its admission will unduly consume time, confuse the issues, or mislead the jury, we will not disturb that ruling absent "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

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[6] Raff's appellate counsel, substituted in after Raff's conviction, also argued this issue in a new trial motion which the trial court denied.

Bowen's plea of no contest to the charge that he was responsible for a later robbery nearby had little tendency to disprove Raff's guilt of the Gomez robbery. Bowen's connection to a robbery near in place and time was actually consistent with the prosecution's evidence at trial that Bowen and Raff travelled together. Gomez firmly identified Raff as the man who robbed him, and stated that Bowen did not look like the robber. It cannot reasonably be inferred from Bowen's plea to a different robbery that Bowen alone committed the robbery of Gomez. Further, what little tendency Bowen's plea of no contest to the Gladstone/Brotman robbery had to disprove Raff's guilt of the charged robbery of Gomez was outweighed by the time that would be required to introduce evidence of another robbery with which Raff was not charged, whose victims were unavailable to testify, and whose addition to the string of robberies in issue could cause confusion. The trial court was within its discretion to deny Raff's request to take judicial notice of Bowen's no contest plea.

II. The trial court properly admitted testimony of Raff's silence.

After the traffic stop of the Optima, Bowen was arrested and placed in the patrol car. Officer Bambrick testified that he then ordered Raff out of the car, detained him, and "asked him a couple of questions, like, 'Hey. What's going on? You know, what's up with the driving?'" Over the defense's objections, Officer Bambrick testified that Raff did

not respond. In closing argument, the prosecution argued that Raff's silence was evidence of guilt: "Officer Bambrick then approaches the defendant, says, 'What's going on?' He's looking around nervously. Wouldn't even respond to him. Does that seem like someone who hasn't done anything wrong, didn't know what [was] happening, was innocent to this whole situation? [¶] The officer said, 'Hey. What's going on? What are you guys doing?' Officer Bambrick doesn't know there's a string of robberies going on. [¶] The defendant won't even talk to him. Does that seem like innocent behavior? Absolutely not."

Raff argues that the prosecution's comments on his silence violated his Fifth Amendment right to due process. We disagree. Raff was not under arrest and Officer Bambrick *was not investigating, nor was he even aware of, the robberies for which Raff was standing trial.* There is a split in the federal courts regarding whether the Constitution is violated when the prosecution comments on a defendant's silence occurring before his arrest and before he received *Miranda* warnings, and uses that silence to argue consciousness of guilt. (See *People v. Waldie* (2009) 173 Cal.App.4th 358, 365-366.)

But the cases finding a constitutional violation all involve questioning that occurred during the investigation of the charged offense. Raff cites no authority, nor have we found any, that the government violates the Constitution when it comments on the defendant's silence during noncustodial questioning unrelated to the crime with which the defendant

is charged. Officer Bambrick did not ask Raff about or accuse him of any criminal behavior, and was unaware of the robberies. (See *U.S. v. Oplinger* (9th Cir.1998) 150 F.3d 1061, 1067 [Fifth Amendment does not preclude admission or commentary "'about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference.'"].) The trial court properly admitted the evidence that Raff was silent when questioned after the traffic stop.

III. The trial court did not err in holding an evidentiary hearing regarding jury contamination without Raff present or in failing to grant Raff's motion for mistrial.

During the trial, Juror No. 1 told the court clerk that the "mother of one of the defendants tried to talk to them in the hallway." Raff's counsel said it was Bowen's mother. The court called Juror No. 1 to a sidebar. The juror explained that while several jurors were eating lunch, a woman from another table spoke to them, saying she was from out of town. When she said her last name was Bowen, they "immediately walked away and said 'we can't talk to you.' And we left." The juror explained that nothing was said and "we just felt that maybe she should be made aware that she can't speak to us." Juror No. 1 then added "I think I caught her say that – you know, something about just hanging out with the wrong group of people. But at that point we were walking away."

Juror No. 4, who was also at the table, confirmed that Bowen's mother said "something about hanging out with the wrong kind" and started crying. Juror No. 5 remembered only that the woman mentioned that she was from South Carolina and mentioned her last name. Juror No. 12 stated that Bowen's mother said, "'Yeah. It's been tough. He's like, two months away from graduation, and then he got caught up with the wrong people or something.' And so she was just very distraught and stuff. [¶] And then we're, like, we shouldn't be hearing this. So, like, then the four of us just got up and left." All the jurors stated that this encounter did not affect them at all in their evaluation of Raff's guilt or innocence.

Raff's counsel argued that Bowen's mother's statement that her son "just got caught up with the wrong crowd" was prejudicial to Raff and asked the court to declare a mistrial. The court denied the motion for mistrial, stating "the comments were made with respect to Mr. Bowen who is no longer a part of this case. They got up immediately and left. They each say that it will not influence them at all with respect to how they would judge the culpability of Mr. Raff in this affair." The trial court instructed the four jurors not to mention the comments to the other jurors and out of the jury's presence asked Bowen's mother to leave the courtroom.

Raff first argues that under the Sixth and Fourteenth Amendments Raff had a right to be present during the sidebar with the jurors. "'[T]he accused is not entitled to be personally present during

proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him, and the burden is upon him to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.'" (*People v. Ervin* (2000) 22 Cal.4th 48, 74.) Raff's presence during the sidebar with the jurors would have served little purpose. His trial counsel was present and argued that a mistrial was appropriate. The trial court questioned all four jurors, and all stated that the encounter would have no influence on them. Raff has not shown what his presence would have provided that his counsel's representation and argument did not, and we conclude that he has not carried his burden to show that his absence prejudiced him or denied him a fair trial.

Nor has he shown that the trial court abused its discretion in denying his motion for a mistrial. The trial court conducted an inquiry and established that the facts did not show any jury contamination or misconduct, and Raff does not show that any misconduct occurred or that any prejudice resulted. (See *In re Hamilton* (1999) 20 Cal.4th 273, 294.)

IV. Sufficient evidence supported the jury verdict of guilty on count 2.

Raff argues that the evidence was insufficient to sustain his conviction on count 2, the robbery of Silverman. We ask whether viewing the evidence in the light most favorable to the prosecution, any

rational jury could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We do not reweigh the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The prosecution argued that Raff aided and abetted Bowen in the Silverman robbery, and the court instructed the jury on aiding and abetting. An aider and abettor may be "'"anyone 'concerned,' however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal."'" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743.)

Silverman was robbed in Santa Monica at 8:30 p.m. on May 21, 2006. Minutes later, at 8:44 p.m., a text message sent from Raff's cell phone described the items taken from Silverman.[7] An hour after the text message was sent from Raff's phone, police in Venice stopped Bowen and Raff in the Optima after watching Raff lean toward the open passenger window near the location where the officers later found on the sidewalk the gun used in the Silverman robbery. Subsequently, Silverman identified Bowen as the robber. Aiding and abetting "'may be committed "on the spur of the moment," that is, as

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[7] The text message was "Just a debit card, like, three. That's all they got. Pinche putos." This is consistent with the contents of Silverman's wallet, which consisted of a debit card and two dollars, in addition to his license.

instantaneously as the criminal act itself,'" and encompasses someone "'who has no prior knowledge of a robbery, but who forms the intent to aid in carrying away the loot.'" (*People v. Swanson-Birabent, supra,* 114 Cal.App.4th at p. 742.) The text message from Raff's cell phone immediately after the robbery describing the wallet contents, and Raff's behavior in the car Bowen drove after the robbery, constituted sufficient evidence that Raff was involved in some way in the Silverman robbery described in count 2.

V. Raff's trial counsel did not provide ineffective assistance.

Raff has the burden to prove that his trial counsel was ineffective, which requires that he show the lawyer's performance "fell below an objective standard of reasonableness" "under prevailing professional norms," and that the errors prejudiced him because but for the errors, there was a reasonable probability that the jury would have had a reasonable doubt as to Raff's guilt. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *In re Cordero* (1988) 46 Cal.3d 161, 180.) Raff presented this argument in his motion for a new trial.

Raff argues that his trial counsel was ineffective because he failed to "investigate and challenge the eyewitness identifications in this case." To the contrary, trial counsel spent a great deal of time challenging the eyewitness identifications, cross-examining the eyewitnesses and arguing to the jury

that the eyewitness identifications were wrong. The court instructed the jury on how to evaluate the testimony of eyewitnesses.

Raff also argues that it was ineffective assistance not to present expert testimony on eyewitness identification. While *exclusion* of such testimony may be an abuse of discretion "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability" (*People v. McDonald* (1984) 37 Cal.3d 351, 377), Raff's case involved substantial corroborating evidence of his involvement in the robberies (for example, his presence in the car from which the gun was thrown, the other evidence found in the car, and the text message on his phone immediately after the Silverman robbery). It was not below an objective standard of reasonableness not to present expert testimony on eyewitness identification.

Raff's other claims of ineffective assistance are similarly without merit. Raff has not shown that trial counsel's decision not to seek a continuance after Bowen's plea was not a reasonable tactical decision. The failure to introduce a handwriting expert to determine who wrote the directions found in the Optima was not ineffective assistance, because it was of little importance whether Raff or someone else wrote the directions; the importance of the directions was that they led to a location near one of the robberies. And finally, Raff has not shown how better preparation of his mother would have made her

testimony more helpful to the defense. All these additional claimed errors were within counsel's latitude to make tactical decisions regarding the conduct of the defense.

VI. We correct the trial court's statement of Raff's sentence.

The trial court described Raff's sentence on count 1 as follows: "The Court selects the low term of 12 years due to the lack of record of the defendant, plus the additional term of ten years pursuant to Penal Code section 12022.53, sub[division] (b)."

The minute order and the abstract of judgment describe Raff's sentence as 12 years as to the substantive offense with a 10-year enhancement pursuant to section 12022.53 on count 1, ordered to run concurrently with the 12-year sentence.

Two years is the low term for second degree robbery in violation of Penal Code section 211. (Pen. Code, § 213.) The 10-year enhancement under section 12022.53 subdivision (b) must be imposed consecutively (any person who commits robbery and "personally uses a firearm, *shall* be punished by an additional *and consecutive* term of imprisonment in the state prison for 10 years" [italics added]).

We therefore correct Raff's sentence to reflect a sentence in count 1 of two years plus an additional 10 years pursuant to the enhancement under section 12022.53, subdivision (b). We also correct the

sentence to impose the required $20 security fee as to each conviction. (Pen.. Code, § 1465.8, subd. (a)(1); *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865.)

DISPOSITION

Because we find no error, there was no cumulative error. We order the sentence modified as follows: The sentence on count 1 is a two-year low term sentence for a violation of Penal Code section 211, plus 10 consecutive years under section 12022.53. Raff is to pay a $20 security fee for each of his three convictions under section 1465.8, subdivision (a)(1). The trial court is directed to prepare an amended abstract of judgment and to forward it to the appropriate prison authorities. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

FERNS, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Court of Appeal, Second Appellate District,
Division One – No. B205719

S175626

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSHUA ELI RAFF, Defendant and Appellant.

(Filed Oct. 22, 2009)

The petition for review is denied.

Kennard and Chin, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

DEPARTMENT LX "D" — HON. KATHERINE MADER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. JOSHUA RAFF, DEFENDANT.	NO. SA060350

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 5, 2007

APPEARANCES:

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REPORTED BY: TRACI THOMAS, CSR #9620
OFFICIAL REPORTER

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* * *

[171] A YES.

Q AND AT THAT POINT IN TIME DID YOU GO THEN AND APPROACH MR. RAFF, THE PASSENGER?

A I WAS STANDING NEXT TO MR. RAFF.

Q OKAY. HOW WAS MR. BOWEN ACTING WHEN YOU APPROACHED THE VEHICLE?

A VERY NERVOUS, EXCITED.

Q HOW WAS MR. RAFF ACTING WHEN YOU APPROACHED THE VEHICLE AS WELL?

A SIMILAR, BUT NOT AS – MR. BOWEN WAS REALLY EXCITED. MR. RAFF APPEARED NERVOUS TO ME, KEPT LOOKING TO HIS LEFT AND HIS RIGHT, LOOKING BACK OVER HIS SHOULDER.

Q AND AT SOME POINT IN TIME DID YOU THEN APPROACH THE PASSENGER SIDE OF THE VEHICLE?

A WHEN MY PARTNER, OFFICER LILO MIAIVA, WAS TALKING TO MR. BOWEN, I WAS STANDING NEXT TO THE PASSENGER DOOR NEXT TO MR. RAFF SITTING THERE THE ENTIRE TIME. SO WE WERE A FEW FEET AWAY FROM EACH OTHER.

Q WHAT WAS THE DEFENDANT DOING WHEN YOU WERE STANDING THERE?

A WHICH ONE?

Q MR. RAFF.

A MR. RAFF. AS I WAS WALKING UP TO THE CAR, HE KEPT – HE WAS LOOKING TO HIS LEFT, HIS RIGHT, HIS LEFT.

ONCE I WALKED UP TO HIM AND ILLUMINATED HIM WITH MY FLASHLIGHT, I TOLD HIM TO PLACE HIS HANDS – EITHER I TOLD HIM TO PUT THEM ON HIS KNEES OR ON THE [172] DASHBOARD IN FRONT OF HIM. AND AT THAT POINT HE JUST STAYED IN THAT POSITION.

Q WHAT, IF ANYTHING, DID YOU SAY OR WHAT HAPPENED NEXT AFTER YOU TOLD HIM TO STAY IN THAT POSITION?

A OFFICER LILO MIAIVA WAS TALKING TO MR. BOWEN. HE WENT THROUGH THAT PAT-DOWN SEARCH, RECOVERED THE I.D., PUT HANDCUFFS ON MR. BOWEN, WALKED HIM BACK AND PUT HIM IN THE DRIVER'S SIDE, REAR DRIVER'S SIDE OF THE POLICE VEHICLE.

I GOT MR. RAFF OUT OF THE CAR AND DETAINED HIM.

Q DID YOU EVER SAY ANYTHING TO MR. RAFF?

A I ASKED HIM A COUPLE OF QUESTIONS, LIKE, "HEY. WHAT'S GOING ON? YOU KNOW, WHAT'S UP WITH THE DRIVING?"

Q AND WHAT, IF ANYTHING, DID HE SAY?

MR. WHITE: OBJECTION.

THE COURT: THIS IS MR. RAFF. OVERRULED.

MR. WHITE: MAY WE APPROACH?

THE COURT: OKAY.

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR:)

MR. WHITE: YOUR HONOR –

THE COURT: WE'RE AT SIDEBAR.

WHAT DID HE SAY?

MR. HALLIGAN: APPARENTLY HE WON'T TALK TO HIM. HE [173] SAYS, "WHAT'S GOING ON? WHAT ARE YOU DOING?" AND HE JUST WOULDN'T TALK TO HIM, WOULDN'T EVEN LOOK AT HIM.

MR. WHITE: THEN I'M WONDERING WHAT'S THE –

THERE'S NO MIRANDA. HE'S IN CUSTODY. HE'S DETAINED.

THE COURT: THERE'S NO EVIDENCE THAT HE'S IN CUSTODY, AND THERE'S NO EVIDENCE OF AN INTERROGATION.

MR. WHITE: HE'S ALREADY SAYING THAT HE'S THERE, YOUR HONOR, WITH HIS

HANDS THERE AND TELLING HIM, "DON'T MOVE YOUR HANDS." HOW IS THAT NOT A DETENTION?

THE COURT: WELL, IT HASN'T BEEN ESTABLISHED THAT IT'S A DETENTION. YOU CAN, I'M SURE, ASK SOME ADDITIONAL QUESTIONS. BUT IT'S CERTAINLY NOT INTERROGATION. THESE ARE QUESTIONS THAT ARE NOT DESIGNED TO ELICIT AN INCRIMINATING RESPONSE. THEY'RE PRELIMINARY INVESTIGATORY QUESTIONS. THEY'VE GOT THESE TWO PEOPLE THAT ARE NOT WEARING SEAT BELTS THAT ARE DRIVING IN AN ERRATIC WAY.

MR. WHITE: IF HE DOESN'T ANSWER ANY QUESTIONS OR ANYTHING, WHY IS THE QUESTION EVEN BEING ASKED IN FRONT OF THE JURY?

THE COURT: BECAUSE THE FACT THAT HE WON'T GIVE ANY INFORMATION AS TO ANYTHING IN RESPONSE I THINK INDICATES I CONSCIOUSNESS OF GUILT.

MR. WHITE: CONSCIOUSNESS OF GUILT OF WHAT? IF THE OFFICER ASKS HIM, "WHAT'S GOING ON?" AND THIS GUY IS DRIVING LIKE A BAT OUT OF HELL, DRIVING ALONG THE STREET AND HE DOESN'T KNOW WHAT'S GOING ON, HOW IS THAT AN ADMISSION OF GUILT? OF WHAT? THIS ISN'T THE ROBBERY [174] INVESTIGATION.

REMEMBER, YOUR HONOR, THIS IS THE OFFICER WHO IS FOLLOWING THEM BECAUSE THEY DON'T HAVE ANY SEAT BELTS ON. THAT'S SUPPOSEDLY WHAT HAPPENED.

THE COURT: EXACTLY.

MR. WHITE: AND THE DRIVER STARTS DRIVING CRAZY. I'M A PASSENGER IN THE CAR, AND I GET STOPPED. AND THE OFFICER QUESTIONS ME WHAT'S GOING ON, AND I'M A PASSENGER IN THE CAR WHAT –

AN ADMISSION OF GUILT OF WHAT? THAT'S WHAT I –

THE COURT: TO ME, ANY REASONABLE PERSON WHO IS NOT GUILTY OF A CRIME WOULD NOT TRY TO EVADE. WHEN ASKED THAT QUESTION, WOULD SAY SOMETHING LIKE, "I DON'T KNOW. MY FRIEND JUST WENT CRAZY. HE JUST SAW AN OLD GIRLFRIEND HE – HE WANTED TO GET AWAY FROM HER. HE THOUGHT HE WAS BEING CHASED."

I MEAN, THERE ARE A MILLION DIFFERENT THINGS THAT AN INNOCENT PASSENGER WOULD SAY UNDER THESE CIRCUMSTANCES. THE FACT THAT HE DIDN'T SAY ANYTHING, TO ME, IS CONSCIOUSNESS OF GUILTY KNOWLEDGE AS TO SOMETHING, OBJECTS IN THE CAR, THE FACT THAT HE COMMITTED A ROBBERY WITH THIS GUY EARLIER THAT DAY. I DON'T KNOW.

MR. WHITE: EXACTLY. WHAT I'M SAYING IS, THOUGH, HOW CAN YOU SAY THAT IT IS?

THE COURT: I SAY THAT IT IS.

(THE FOLLOWING PROCEEDINGS WERE HELD IN [175] OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: OKAY. MR. HALLIGAN.

MR. HALLIGAN: THANK YOU, YOUR HONOR.

Q OFFICER BAMBRICK, WHEN YOU APPROACHED THE DEFENDANT, WHEN YOU ASKED HIM, "HEY. WHAT'S GOING ON," WHAT, IF ANYTHING, DID THE DEFENDANT SAY OR DO TO YOU?

A HE DIDN'T RESPOND.

Q WHAT EXACTLY DID HE DO WHEN YOU ASKED HIM WHAT'S GOING ON?

A JUST KIND OF STARED STRAIGHT AHEAD.

Q AND AT SOME POINT DID YOU GET HIM OUT OF THE CAR?

A HE WAS OUT OF THE CAR AT THIS POINT WHEN I ASKED HIM THOSE QUESTIONS.

Q AND ONCE YOU GOT HIM OUT OF THE CAR AND HE WOULDN'T RESPOND TO YOUR QUESTION, WHAT DID YOU DO NEXT?

A I JUST HANDCUFFED HIM AND PLACED HIM IN THE BACK SEAT OF THE CAR WITH MR. BOWEN.

* * *

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT LX "D"
HON. KATHERINE MADER, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. JOSHUA RAFF, DEFENDANT.	NO. SA060350

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 6, 2007

APPEARANCES:

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TRACI THOMAS, CSR #9620
OFFICIAL REPORTER

* * *

[354] [Deputy District Attorney Kevin Halligan]

MR. BOWEN IS THE DRIVER. THE DEFENDANT IS A PASSENGER.

AT SOME POINT IN TIME THE POLICE GET MR. BOWEN OUT OF THE CAR. AND WHAT IS IN HIS POCKET? MR. SILVERMAN'S I.D.

OFFICER BAMBRICK THEN APPROACHES THE DEFENDANT, SAYS, "WHAT'S GOING ON?" HE'S LOOKING AROUND NERVOUSLY. WOULDN'T EVEN RESPOND TO HIM. DOES THAT SEEM LIKE SOMEONE WHO HASN'T DONE ANYTHING WRONG, DIDN'T KNOW WHAT HAS HAPPENING, WAS INNOCENT TO THIS WHOLE SITUATION?

THE OFFICER SAID, "HEY. WHAT'S GOING ON? WHAT ARE YOU GUYS DOING?" OFFICER BAMBRICK DOESN'T KNOW THERE'S A STRING OF ROBBERIES GOING ON.

THE DEFENDANT WON'T EVEN TALK TO HIM. DOES THAT SEEM LIKE INNOCENT BEHAVIOR? ABSOLUTELY NOT.

* * *

[374] [Deputy District Attorney]

OF COURSE HE KNOWS WHAT'S GOING ON. HE KNEW WHAT WAS GOING ON WHEN THE DEFENDANT, MR. BOWEN, GOT OUT OF THE CAR. HE KNEW WHAT WAS GOING ON WHEN HE GOT BACK IN THE CAR. HE KNEW WHAT WAS GOING ON WHEN BASICALLY HE CHANGED CLOTHES. HE KNEW WHAT WAS GOING ON WHEN HE TEXT MESSAGES HIS FRIEND ABOUT ROBBING PEOPLE. HE KNEW WHAT WAS GOING ON WHEN HE THREW THAT GUN OUT OF THE CAR. AND HE KNEW WHAT WAS GOING ON WHEN THE POLICE STOPPED HIM AND SAID, "WHAT'S HAPPENING? WHAT'S GOING ON? WHAT ARE YOU GUYS DOING?" AND HE DOESN'T EVEN TALK.

LADIES AND GENTLEMEN, I KNOW I'VE BEEN A LITTLE BIT LENGTHY. I'M GOING TO GO OVER A LITTLE BIT MORE OF WHEN MR. WHITE HAS AN OPPORTUNITY TO SPEAK WITH YOU.

* * *